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No. 02-1624

In the

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT
and DAVID W. GORDON, Superintendent, EGUSD,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC RESEARCH INSTITUTE AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether Respondent has standing to challenge as unconstitutional a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance.

2. Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. NEWDOW LACKS STANDING UNDER ARTICLE III TO CHALLENGE AS UNCONSTITUTIONAL A LOCAL SCHOOL DISTRICT'S POLICY THAT REQUIRES TEACHERS TO LEAD WILLING STUDENTS IN RECITING THE PLEDGE OF ALLEGIANCE 7

A. Newdow's Dissatisfaction with the Words "Under God" Should Be Addressed to Congress, Not to the Federal Courts 7

B. Newdow Has No Concrete Injury and a Determination of the Merits Would Be Outside the Bounds of This Court's Judicial Authority and Obligation 10

1. Newdow's Status as a Noncustodial Parent Does Not Give Him Standing 11

2. Newdow Lacks Taxpayer Standing 13

3. Newdow Has Not Established Noneconomic Injuries 15

II. THE VOLUNTARY RECITATION OF THE PLEDGE FOSTERS AN APPRECIATION FOR THE PRINCIPLES UPON WHICH THIS NATION WAS FOUNDED 18

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Agostini v. Felton, 521 U.S. 203 (1997) 2

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 2, 10-11

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 23

Doe v. Madison School District, No. 321, 177 F.3d 789 (9th Cir. 1999) 14

Doremus v. Board of Education of Borough of Hawthorne, 342 U.S. 429 (1952) 11-12, 14

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 9

Engel v. Vitale, 370 U.S. 421 (1962) 23

Hall v. City of Taft, 47 Cal. 2d 177, 302 P.2d 574 (1956) 21

H.C. ex rel. Gordon v. Koppel, 203 F.3d 610 (9th Cir. 2000) 12-13

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 7, 10, 17

Lynch v. Donnelly, 465 U.S. 668 (1984) 18, 23-24

Marsh v. Chambers, 463 U.S. 783 (1983) 20

Milliken v. Bradley, 418 U.S. 717 (1974) 21-22

Mitchell v. Helms, 530 U.S. 793 (2000) 2

Newdow v. United States Congress, 292 F.3d 597 (9th Cir. 2002) 3, 9

TABLE OF AUTHORITIES—Continued

Page

Newdow v. United States Congress, 313 F.3d 500 (9th Cir. 2002) 4, 11-12

Newdow v. United States Congress, 321 F.3d 772 (9th Cir. 2003) 4, 21

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) 11

Roe v. Wade, 410 U.S. 113 (1973) 11

Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995) 2

School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 23

United States v. Lopez, 514 U.S. 549 (1995) 21

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 5, 8-9, 16-17

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) 16

Warth v. Seldin, 422 U.S. 490 (1975) 8, 17

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 18

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 1-2

Federal Statutes

4 U.S.C. § 4 2

31 U.S.C. § 5114(b) 20

TABLE OF AUTHORITIES—Continued

Page

36 U.S.C. § 172 2

§ 302 20

Pub. L. No. 396, ch. 297, 68 Stat. 249 (1954) 2

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California Statutes

Cal. Educ. Code § 52720 2

Cal. Family Code § 3003 12

§ 3006 12

United States Constitution

U.S. Const. art. III, § 2, cl. 1 7

Amend. X 21

California Constitution

Cal. Const. of 1879, Preamble 20

Cal. Const. art. IX, § 1 ..... 6, 20

Rules

Sup. Ct. R. 37 1

Sup. Ct. R. 37.6 1

Miscellaneous

The Declaration of Independence (U.S. 1776) 20

H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954) 19

H.R. Rep. No. 1693, 83d Cong., 2d Sess. 3 (1954) 19

S. Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954) 19

TABLE OF AUTHORITIES—Continued

Page

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Research Institute and Pacific Legal Foundation respectfully submit this brief amicus curiae in support of Petitioners, Elk Grove Unified School District, et al.[1] Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of the Court.

Pacific Research Institute (Institute) promotes individual freedom and personal responsibility. The Institute believes these principles are best encouraged through policies that emphasize a free economy, private initiative, and limited government. Since its founding in 1979, the Institute has remained steadfast to the vision of a free and civil society where individuals can achieve their full potential. By focusing on public policy issues including education, the environment, health care, entrepreneurship, and regulation, the Institute fosters a better understanding of a free society among leaders in government, academia, the media, and the business community. Through its four research centers the Institute publishes books and studies, provides commentary to media, hosts public events, and conducts comprehensive grassroots and community outreach. The Institute has appeared before this Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and in support of the Petition for Writ of Certiorari in this matter.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, tax-exempt public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. Thousands of

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

individuals across the country support PLF, as do numerous organizations and associations. PLF is headquartered in Sacramento, California, and has offices in Bellevue, Washington; Coral Gables, Florida; Honolulu, Hawaii; and a liaison office in Anchorage, Alaska. PLF attorneys actively engage in research and litigate over a broad spectrum of public interest issues nationwide. PLF submits this brief because it believes its public policy perspective and litigation experience will provide a valuable viewpoint. PLF attorneys have participated in cases before this Court, including *Zelman v. Simmons-Harris*, 536 U.S. 639; *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995); and *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). PLF also filed a brief amicus curiae in support of the Petition for Writ of Certiorari in this matter.

STATEMENT OF THE CASE

California law requires each public elementary school in the State to "conduct appropriate patriotic exercises" at the beginning of the school day. Cal. Educ. Code § 52720. The law provides that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section."[2] *Id.* The Elk Grove Unified School District (Elk Grove) adopted a policy that directs elementary school teachers to begin each school day by leading

[2] On June 22, 1942, Congress first codified the Pledge as "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Pub. L. No. 623, ch. 435 § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 172). On June 14, 1954, Congress amended Section 172 to add the words "under God" after the word "Nation." Pub. L. No. 396, ch. 297, 68 Stat. 249 (1954). The Pledge is now found in Title 4 of the United States Code. *See* 4 U.S.C. § 4.

willing students in reciting the Pledge. Pet. App. 27a. No child is compelled to join in reciting the Pledge.

Notwithstanding the state's characterization of the Pledge as an appropriate patriotic exercise, Newdow, an atheist whose daughter attends public elementary school in Elk Grove, brought suit for declaratory and injunctive relief in the United States District Court. Newdow maintains that reciting the Pledge with the phrase "under God" is facially unconstitutional under the Establishment and Free Exercise Clauses of the First Amendment. Newdow alleges he has been injured by this practice under three theories: as the parent of a student currently enrolled in a California public school (Pet. App., Complaint ¶¶ 76, 94); as a taxpayer (*id.* at ¶¶ 109-19); and as a citizen who attends school board meetings where the Pledge is recited, who may wish to run for the school board, or who may wish to teach in the public schools (*id.* at ¶¶ 85-86, 120-21).

The district court dismissed the Complaint for failure to state a claim. Pet. App. at 97. Newdow appealed and in June, 2002, a divided panel of the Ninth Circuit found that Newdow had standing to challenge Elk Grove's "policy and practice regarding the recitation of the Pledge because his daughter is currently enrolled in elementary school in the EGUSD." *Newdow v. United States Congress*, 292 F.3d 597, 603 (9th Cir. 2002) (*Newdow I*). In addition, a majority of the court concluded that Newdow had standing in his own right to challenge the facial constitutionality of the 1954 Act. "[T]he mere enactment of a statute may constitute an Establishment Clause violation." *Id.* The Ninth Circuit reasoned that because the 1954 Act amounts to a "religious recitation policy that interferes with Newdow's right to direct the religious education of his daughter" he has Article III standing. *Id.* at 605. The Ninth Circuit held that the words "under God" in the Pledge and the school district's policy of teacher-led recitation of the Pledge, violated the Establishment Clause. *Id.* at 612. Elk

Grove petitioned the Ninth Circuit for rehearing and rehearing en banc.

While the petition for rehearing was pending, the mother of Newdow's daughter filed a motion for leave to intervene in order to challenge Newdow's standing. She attached to her motion a copy of a February 6, 2002, California superior court custody order awarding her "sole legal custody" of the child and enjoining Newdow from using his daughter as an unnamed party or representing her as a "next friend" in the lawsuit. *Newdow v. United States Congress*, 313 F.3d 500, 505 (9th Cir. 2002). Instead of dismissing the action, the Ninth Circuit found that Newdow continued to have Article III standing. *Id.*

Thereafter, the Ninth Circuit panel ruled against rehearing and insufficient votes were cast for en banc consideration. The June, 2002, decision was amended to avoid expressly reaching the question of the constitutionality of the 1954 Act. *Newdow v. United States Congress*, 321 F.3d 772 (9th Cir. 2003) (*Newdow II*). However, the decision held that Elk Grove's policy violates the Establishment Clause. Because of the Ninth Circuit's opinion, the voluntary recitation of the Pledge in the public schools of the nine western states is banned, thereby directly affecting over 9.85 million public school students.[3] This Court granted the writ of certiorari.

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[3] *See* U.S. Dept. of Ed., Nat'l Ctr. for Ed. Statistics, *available at* http://nces.ed.gov/ccd/bat/Result.asp?view=State&id=53710599; http://nces.ed.gov/pubs2003/2003358.pdf (last visited Dec. 11, 2003). The approximate figure is for the school year 2001-02, comprising the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as Guam and the Northern Marianas.

SUMMARY OF ARGUMENT

Article III standing is a crucial and inseparable element of the principle of separation of powers. It limits litigation to actual cases and controversies; otherwise, going beyond these parameters would infringe on the executive and legislative branches. Newdow's dissatisfaction with the words "under God" in the Pledge should be addressed to Congress, and not to the federal courts.

The Ninth Circuit, in order to reach the merits of this case, ignored the requirements for establishing Article III standing. First, the Ninth Circuit ignored a California superior court custody order awarding sole custody of Newdow's daughter to the mother. The custody order enjoined Newdow from using his daughter as an unnamed party or representing her as a "next friend." Under California law, Newdow has no authority to make final decisions regarding the education of his daughter. Even if there is some limited parent right remaining, Newdow's legal rights as a noncustodial parent are not directly infringed upon by Elk Grove's policy directing teachers to lead willing students in reciting the Pledge. Second, the Ninth Circuit ignored the fact that Newdow lacked taxpayer standing because he failed to identify anything beyond a *de minimus* expenditure of taxpayer money by Elk Grove on the recitation of the Pledge. Third, the Ninth Circuit ignored that Newdow's noneconomic injuries were tantamount to psychological consequences based on a traditional patriotic expression with which he disagrees. In doing so, the Ninth Circuit improperly transformed the federal courts into "publicly funded forums for the ventilation of public grievances." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982).

The words "under God" in the Pledge, and Elk Grove Unified School District's policy providing for teachers to lead willing students in reciting the Pledge, are permissible

expressions of patriotism and do not violate the Establishment Clause. The drafters of the Pledge intended that it should be read by school children to encourage a profound respect for the origins of this country. References to a supreme being can be found in numerous historical documents including the Declaration of Independence. It is also found on the nation's currency and in the National Motto. The inclusion of the words "under God" does not detract from recognition that the Pledge is an expression of patriotism.

Education of children is vital to keeping America a free and functioning society. The Founders believed that this meant not only the dissemination of facts, but also the inculcation of moral character. Children's education should include citizenship, patriotism, and loyalty to the state and to the nation. Education has been viewed as an essential component of a core area of state sovereignty. The Ninth Circuit opinion reaches deeply into this core area and will disrupt the academic standards for the study of American history adopted by the California State Board of Education.

The public policy of the State of California places great emphasis on the education of its children. The California Constitution directs the Legislature to encourage "by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement." Cal. Const. art. IX, § 1. The Legislature adopted section 52720 of the California Education Code requiring the state's public elementary schools to begin each school day with appropriate patriotic exercises and reciting the Pledge satisfies this requirement. Elk Grove complies with this state law. To hold that the United States Constitution prohibits the state and school districts from allowing the recitation of the Pledge as a patriotic expression ignores history and undermines the efforts of California to foster the moral character of its students. The Pledge is designed for all Americans. It is simply a recognition of what it means to be an American.

ARGUMENT

I

NEWDOW LACKS STANDING UNDER ARTICLE III TO CHALLENGE AS UNCONSTITUTIONAL A LOCAL SCHOOL DISTRICT'S POLICY THAT REQUIRES TEACHERS TO LEAD WILLING STUDENTS IN RECITING THE PLEDGE OF ALLEGIANCE

A. Newdow's Dissatisfaction with the Words "Under God" Should Be Addressed to Congress, Not to the Federal Courts

Newdow seeks declaratory relief that the 1954 statute adding the words "under God" to the Pledge is unconstitutional and should be enjoined. *See* Pet. App., Complaint ¶ 29 and Prayer for Relief. Newdow's grievance is with Congress and does not belong in federal court.

The judicial doctrine of standing is a crucial and inseparable element of the principle of separation of powers.[4] Standing requirements ensure that federal courts stay within the boundaries of the constitutional limitations found in Article III of the Constitution. Standing limits the opportunity to litigate to those who have actual "cases" or "controversies" under Article III. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), this Court explained that "the core component of standing is an essential and unchanging part of the case or controversy requirement of Article III." *See also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) (Any expansion of the standing doctrine that allows greater access to federal courts should be treated with suspicion, since standing is a fundamental principle of separation of powers, keeping the courts limited to their proper role.).

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[4] *See* U.S. Const. art. III, § 2, cl. 1.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. at 472, this Court recognized that the standing requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Otherwise, "[g]oing beyond these parameters would infringe on both the executive and legislative branches and would allow nine unelected individuals to issue advisory opinions and make public policy decisions more appropriately addressed by the representative branches of government." Ryan Guilds, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. Rev. 1863, 1869 (1996) (Guilds). *See also Warth v. Seldin*, 422 U.S. 490, 500 (1975) (without standing requirements the court would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and judicial intervention may be unnecessary to protect individual rights).

Article III standing has been used both as a sword and a shield to reach, or avoid reaching, the merits of a difficult constitutional question. Legal commentators have noted that when a federal court decides it wants to hear the substantive issues of a case it will use standing as a sword by ignoring the underlying standing requirements, creating new requirements to standing jurisprudence, or manipulating the standing requirements. Guilds at 1870. Federal courts have also used standing as a shield to avoid reaching the merits. *Id.* Members of this Court have recognized that standing has been used both as a sword and a shield. "[T]he Court disregards its constitutional responsibility when, by failing to acknowledge the protections afforded by the Constitution, it uses 'standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits.'" *Valley Forge*,

454 U.S. at 490 (Brennan, J., dissenting). *See also Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 95 (1978) (Rehnquist, J., dissenting) (arguing that the Court reached the merits of dispute, despite a lack of standing, in order to "remove the doubt which has been cast over this important federal statute").

Here, the Ninth Circuit used standing as a sword to reach the ultimate question on the merits despite Newdow's lack of standing. The Ninth Circuit consistently characterized Newdow's purported Article III standing as though his standing revolved around the unconstitutional conduct. For example, the court found that Newdow had standing in his own right to challenge the facial constitutionality of the 1954 Act amending the Pledge because "the mere enactment of a statute may constitute an Establishment Clause violation," *Newdow I*, 292 F.3d at 603. The court also said that because Elk Grove's policy amounts to a "religious recitation policy that interferes with Newdow's right to direct the religious education of his daughter," Newdow had standing. *Id.* at 605. Yet, as explained in Part B below, the type of injury that Article III requires must be discernible separate and apart from the legal question at issue. "The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.'" *Valley Forge*, 454 U.S. at 484. Because the Ninth Circuit confused the standing inquiry with the importance of the question on the merits, it transformed the federal courts into a "publicly funded forum for the ventilation of public grievances." *Id.* at 473. The separation of powers doctrine requires Newdow's dissatisfaction with the words "under God" in the Pledge be addressed to Congress, and not to the federal courts.

B. Newdow Has No Concrete Injury and a Determination of the Merits Would Be Outside the Bounds of This Court's Judicial Authority and Obligation

In order for Newdow to have Article III standing to challenge as unconstitutional a public school policy that requires teachers to lead willing students in reciting the Pledge, he needs to establish three elements: (1) that he suffered a concrete and particularized "injury in fact," not an injury that is conjectural or hypothetical; (2) a causal connection existed between the alleged illegal conduct and Newdow's injury; and (3) a favorable court decision would likely redress Newdow's alleged injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61. The plaintiff carries the burden "in the same way as any other matter on which the plaintiff bears the burden of proof, i.e. with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. If at any time Article III standing is not met, the action must be dismissed. *Arizonans for Official English v. Arizona*, 520 U.S. at 69 (to satisfy the constitutional jurisdictional requirements, the controversy must be extant at all stages of review, and not only when the complaint is filed).

An examination of Newdow's complaint shows that his allegations do not confer Article III standing to challenge Elk Grove's policy requiring teachers to lead willing students in reciting the Pledge. According to the Complaint, Newdow brought this action under three standing theories: as the parent of a student currently enrolled in public school (Pet. App., Complaint ¶¶ 76, 94); as a taxpayer (*id.* at ¶¶ 109-19), and as a citizen who attends school board meetings where the Pledge is recited, or who may wish to run for the school board, or who may wish to teach in the public schools (*id.* at ¶¶ 85-86, 120-21). As shown below, Newdow has not alleged sufficient injury to state a constitutional challenge to Elk Grove's policy.

1. Newdow's Status as a Noncustodial Parent Does Not Give Him Standing

There is no dispute that parents who have legal custody of their children have standing to assert the claims of their minor children to protect the parents' own constitutional rights to direct and control the religious and educational upbringing of their children. *See Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925) (right of parents to direct the education of their children acknowledged). When Newdow brought this lawsuit, he brought it in his name only. Although he did not name his daughter as a plaintiff, he did allege that he "represents" his daughter in this action. This allegation created the impression that he had sole and exclusive parental rights to direct his daughter's religious education. (*See* Pet. App., Complaint ¶ 9). When a California superior court awarded sole legal custody of the child to the mother and enjoined Newdow from using his daughter as an unnamed party or representing her as a "next friend" in this lawsuit, *Newdow v. U.S. Congress*, 313 F.3d. at 505, Newdow no longer had a case or controversy. The Ninth Circuit should have dismissed the appeal.

The case or controversy limitation of Article III means that the actual controversy must exist at each stage including appellate or certiorari review, "and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113, 125 (1973). Each court must determine whether those claims remain live controversies or whether the matter should be dismissed. As recognized in *Arizonans for Official English*, 520 U.S. at 71, when a civil case becomes moot pending appellate review, the established practice in the federal system is to reverse or vacate the judgment below and remand with directions to dismiss.

In *Doremus v. Board of Education of Borough of Hawthorne*, 342 U.S. 429 (1952), plaintiffs challenged a state statute providing for the reading of five verses of the Old Testament at the opening of each public school day. One of the

plaintiffs asserted standing on the ground, *inter alia*, that his daughter was a public school student. This Court rejected that ground noting that the daughter had graduated before the appeal was taken to the Supreme Court. This Court stated: "Obviously no decision we could render now would protect any rights she may once have had, and this Court does not sit to decide arguments after events have put them to rest." 342 U.S. at 432-33.

Here, while the petition for rehearing and rehearing en banc was pending before the Ninth Circuit, the mother of Newdow's daughter filed a motion for leave to intervene in order to challenge Newdow's standing. *Newdow*, 313 F.3d 500. She brought to the Ninth Circuit's attention a custody order from a California superior court awarding her "sole legal custody" of the child. *Id.* at 502. California law does not permit a noncustodial parent to make final decisions relating to the child's health, education, or welfare. *Compare* Cal. Family Code § 3003 (defining "joint legal custody" as both parents *sharing* the right to make decisions regarding the health, education, and welfare of their child) *with* Cal. Family Code § 3006 (defining "sole legal custody" as one parent having the sole right and responsibility to make such decisions). On the basis of the state custody order, the Ninth Circuit should have dismissed the case. Instead, the Ninth Circuit, using Article III standing as a sword to get to the merits, held "that Banning [the mother] has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action." 313 F.3d at 505.

Additionally, the Ninth Circuit's ruling on standing ignores the principles of federalism. Family relations are traditionally an area of state concern. *H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000). States have a vital interest in protecting the authority of their judicial system so that their

orders are not rendered nil. *Id.*[5] Here, the state court order awarding sole legal custody to the mother should be respected. It granted the mother sole control over the child's "health, education, and welfare" and the mother has made it clear that she has no objection to her child reciting the Pledge as part of her education. Where, as here, the two parents disagree on educational practices, the decision remains with the parent who has legal custody. Newdow has no legal right to overturn the mother's decision. If Newdow believes that the mother's educational decision is harming the child, the proper remedy is for him to resort to California's family law court and seek a modification of the custody agreement. Newdow cannot use federal litigation to circumvent that state-law process or to modify a state-law custody judgment. Since Newdow, under California law, has no authority to make final decisions regarding the education of his daughter, he may not assert such an interest as a basis for Article III standing.

Even assuming that Newdow's status as a noncustodial parent imparts some residual right to expose his daughter to his views, Newdow has not alleged that the Elk Grove policy requiring teachers to lead willing students injures or has any causal connection with his ability to expose his child to his particular viewpoints.

2. Newdow Lacks Taxpayer Standing

Newdow alleges that as a taxpayer his First Amendment rights are violated when his tax money is used to pay teachers who lead students in the recitation of the Pledge in taxpayer financed classrooms (Pet. App., Complaint ¶¶ 110-12); the printing of the United States code and other written materials

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[5] Carl Rowan Metz, Comment, *Application of the Younger Abstention Doctrine to International Child Abduction Claims*, 69 U. Chi. L. Rev. 1929, 1936 (2002) ("Family relations are a traditional area of state concern, and a state has an important interest in admininstering aspects of its judicial system.").

containing the Pledge (*id.* at ¶ 113); the recitation of the Pledge at federal, state, and county functions (*id.* at ¶ 114); and the use of federal money to support annual festivities supporting the Pledge (*id.* at ¶ 115).

In *Doremus*, 342 U.S. 429, this Court recognized that a taxpayer may possess standing to litigate "a good-faith pocketbook action." There, plaintiffs were taxpayers who challenged a school law mandating Bible reading in public schools. 342 U.S. at 430-31. This Court found that the plaintiffs failed to establish a direct monetary injury that would confer standing because they did not allege that the Bible reading was "supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school." 342 U.S. at 433. Additionally, the plaintiffs failed to provide any "information . . . as to what kind of taxes" they paid or to aver "that the Bible reading increase[d] any tax they [did] pay or that as taxpayers they are, will, or possibly can be out of pocket because of the activity." *Id.* As a result, the plaintiffs lacked standing to sue. *See also Doe v. Madison School District, No. 321*, 177 F.3d 789, 794 (9th Cir. 1999) ((en banc) (noting that "the school's expenditures for teachers' salaries, equipment, building maintenance, and the like were insufficient to confer taxpayer standing [in *Doremus*] despite their indirect support of the Bible reading")).

Here, Newdow fails to identify any funds used by Elk Grove solely for the recitation of the Pledge by willing students. His allegations are simply that tax dollars are spent for teachers' salaries, flags, the physical plant, including classrooms, and the utilities in the classroom. Pet. App., Complaint ¶ 112.[6] Even granting that tax moneys were spent for teachers' salaries, flags,

[6] Newdow's declaration filed with the Ninth Circuit Court of Appeals in opposition to the motion to intervene fails to disclose any taxpayer allegations.

the classrooms, and utilities, there is no indication that the portion of such expenditure attributable to the challenged elements of reciting the Pledge would have been more than the *de minimus* expenditure that was involved in the Bible reading in *Doremus*. Under *Doremus* and *Doe*, Newdow has failed to carry his burden of proving an expenditure of revenues to which he contributed would make his suit "a good-faith pocketbook action." Consequently, Newdow cannot invoke federal jurisdiction as a taxpayer.

3. Newdow Has Not Established Noneconomic Injuries

Newdow has not established Article III standing based on noneconomic injuries suffered as a result of the Elk Grove policy requiring teachers to lead willing students in reciting the Pledge. Newdow describes himself as an atheist minister who views belief in a deity as the "repudiation of rational thought processes, and [which] offends all precepts of science and natural law." Pet. App., Complaint ¶¶ 53-54, 56, 61-62, 77. He objects to Congress inserting the words "under God" into the Pledge. *Id.* at ¶ 27. He objects to his daughter being compelled to "watch and listen as her state-employed teacher in her state-run school leads her and her classmates in a ritual proclaiming that there is a God, and that ours is 'one Nation under God.'" *Id.* at ¶ 79. Yet nowhere does Newdow allege that his daughter is required to recite the Pledge or that she has been punished or in any way singled out for declining to participate in reciting the Pledge. To the contrary, he alleges in his Complaint that the superintendent of Elk Grove advised him that his daughter is free not to participate. (*Id.* at ¶¶ 95-96.)

Newdow further alleges that he is a citizen who attends school board meetings where the Pledge is recited and that it makes him feel like an "outsider." *Id.* at ¶¶ 85-86. He also alleges that he may wish, someday, to run for the school board; or he may wish to teach in the public schools but he would be unable to follow Elk Grove's policy. *Id.* at ¶¶ 120-21

Newdow's allegations show that he has not suffered a concrete, actual injury, or one that is imminent. Instead, his alleged injuries are hypothetical or conjectural, which is insufficient to establish Article III standing. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, (2000) (an interest unrelated to the injury in fact is insufficient to give a plaintiff standing). Nowhere does Newdow allege that he has attempted to become a teacher or been prevented from doing so because he is an atheist. Nowhere does Newdow allege that anyone has prevented him from running for the school board because he is an atheist. None of Newdow's allegations are sufficient to grant him Article III standing.

In *Valley Forge*, the plaintiffs read in a news release that the federal government was going to convey federally-owned land in Pennsylvania to Valley Forge Christian College. 454 U.S. at 469. This Court found that the named plaintiffs lacked standing.

> Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, *other than the psychological consequence presumably produced by observation of conduct with which one disagrees*. This is not an injury sufficient to confer standing under Article III, even though the disagreement is phrased in constitutional terms.

454 U.S. at 485-86 (emphasis added).

This Court added:

> [The plaintiffs'] claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were

> simply not constituted as ombudsmen of the general welfare.

454 U.S. at 486-87.

Newdow's alleged injuries are psychological in that he feels "less welcome" in the classroom and at public meetings where the Pledge is recited. These are similar to the "psychological consequence[s] . . . produced by observation of conduct with which one disagrees," *Valley Forge*, 454 U.S. at 485, that this Court ruled are insufficient to establish standing. None of these allegations show any concrete injury to Newdow arising from the Elk Grove policy requiring teachers to lead willing students in reciting the Pledge.

In sum, Newdow's claim is nothing more than a grievance "shared in substantially equal measure by all or a large class of citizens," *Warth v. Seldin*, 422 U.S. at 498-502, which is not sufficient for purposes of Article III standing in federal court. As this Court recognized in *Lujan*,

> We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

504 U.S. at 573-74.

Federal courts are not "public funded forums for the vindication of public grievances." *Valley Forge*, 454 U.S. at 473. Rather they are venues preserved for those who have a direct stake in the outcome of the controversy which they seek to litigate. Here, Newdow lacks the direct stake in Elk Grove's policy required to give this Court jurisdiction to adjudicate his claim. This action should be dismissed.

II

THE VOLUNTARY RECITATION OF THE PLEDGE FOSTERS AN APPRECIATION FOR THE PRINCIPLES UPON WHICH THIS NATION WAS FOUNDED

The Ninth Circuit's opinion fails to consider the import of this Court's decision in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, this Court held that a school district may not compel any school child to recite the Pledge.[7] In doing so, this Court emphasized the state's right to "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." *Id.* at 631. This Court further stated that "[f]ree public education, if faithful to the idea of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." *Id.* at 637.

Newdow objects to the words "under God" in the Pledge claiming that they violate the Establishment Clause. This Court has recognized that the interpretation of the Establishment Clause should reflect a historical understanding of what the clause entails. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). A key part of that history includes a substantial role for the public acknowledgment of a supreme being as the source of "unalienable rights" and the use of religion to support that understanding.

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[7] Amici understand that *Barnette* was issued prior to the 1954 Act amending the Pledge to add the words "under God"; yet, believes that *Barnette* is instructive. Further, Newdow admits that his daughter was not required to recite the Pledge. *See* Pet. App., Complaint ¶¶ 95-96.

In amending the Pledge in 1954, Congress echoed these sentiments: Through daily recitation of the Pledge in schools, "the children of our land . . . will be daily impressed with a true understanding of our way of life and its origins." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 3 (1954). The House Report noted the nation's Founders did not intend to prohibit government expressions that recognized the importance of this country's religious heritage. *Id.* The Report goes on to explain that Congress believed it was acting consistently under controlling precedent from this Court:

> The Supreme Court has clearly indicated that references to the Almighty which run through our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment.

Id. at 3. It also notes that the amendment "is not an act establishing a religion or one interfering with the 'free exercise' of religion." *Id.* The addition of the words "under God" to the Pledge created no new constitutional infirmities. The Pledge simply acknowledges various fundamental principles upon which our nation was founded over two centuries ago, which is hardly unique to the Pledge.

The Committee Reports in amending the Pledge traced the numerous references to God in historical documents from the Mayflower Compact to the Declaration of Independence to President Lincoln's Gettysburg Address, which used the reference "Nation[] under God." H.R. Rep. No. 1693 at 2, 83d Cong., 2d Sess. 2 (1954); S. Rep. No. 1287 at 2, 83d Cong., 2d Sess. 2 (1954).

References reflecting religious belief can be found in the Declaration of Independence. The Declaration cites "the Laws of Nature and of Nature's God" as authority for "dissolv[ing] the political bands" between the American colonies and the British empire, and recognizes as "self-evident" truths

> that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

The Declaration of Independence ¶ 1 (U.S. 1776).

Constitutionally permissible religious references are part of the fabric of our society. In *Marsh v. Chambers*, 463 U.S. 783, 786 (1983), this Court discussed numerous examples such as "God save the United States and this Honorable Court," which is used to open all sessions of this Court. Other examples include placing the words "In God We Trust" on all currency, 31 U.S.C. § 5114(b), which Congress later codified as the National Motto. 36 U.S.C. § 302. Accordingly, the inclusion of the words "under God" does not detract from recognition that the Pledge is an expression of patriotism and love of country, and not an exercise of religious faith.

These sentiments are echoed in California's organic law. The preamble to the California Constitution states: "We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution." Cal. Const. of 1879, Preamble. The beliefs of the Founders that education of children was vital to keeping America a free and functioning society is reflected in Article IX of the California Constitution. "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Cal. Const. art. IX, § 1.

In California, this requires the public schools to teach science, math, and moral values. In fact, section 233.5 of the California Education Code recognizes that a primary purpose of

education is to teach school children good citizenship, patriotism, and loyalty to the state and the nation as a means of protecting the public welfare. *See* Michael K. Steenson, *Essay: Pledging Allegiance*, 29 Wm. Mitchell L. Rev. 747, 770 (2003) ("Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that justify its survival. Public schools help to transmit those virtues and values.").[8]

Education in California is of statewide concern. *Hall v. City of Taft*, 47 Cal. 2d 177, 179, 302 P.2d 574, 576 (1956). In adopting section 52720 of the California Education Code, the California legislature wanted to encourage public school students to express love for our country by participating in patriotic exercises. Consistent with the state law, Elk Grove required teachers to lead willing students in reciting the Pledge. The Ninth Circuit plainly erred when it described the Pledge, as amended in 1954, as a profession of a religious belief.

Further, the Ninth Circuit's opinion deeply intrudes into education and raises serious federalism concerns. This Court has often acknowledged that the Constitution creates a federal government of limited and enumerated powers, with the bulk of powers reserved to the states or to the people. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 552 (1995); U.S. Const. amend. X; *The Federalist No. 45*, at 232-37 (James Madison) (Bantam Books ed., 1982). Education is among the most important of those duties not delegated to the federal government but reserved to the states or to the people. *United States v. Lopez*, 514 U.S. at 580 ("[I]t is well established that education is a traditional concern of the states."). *See also Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) ("No single tradition in

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[8] Each of the 50 states lead public school students in voluntary recitation of the Pledge of Allegiance. *See United States of America v. Michael A. Newdow*, Petition for a Writ of Certiorari at 25, *Newdow II*, 321 F.3d 772 (No. 02-1574) (denied October 14, 2003).

public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

Moral instruction fostered by the history of this nation has been viewed as an essential component of education in California. The California State Board of Education has developed academic standards for the study of American history for grades kindergarten-12. These carefully developed standards foster citizenship through the study of American history. The state's standards recognize that America is "a noble experiment in a constitutional republic[, and] . . . that America's ongoing struggle to realize the ideals of the Declaration of Independence and the United States Constitution is the struggle to maintain our beautifully complex national heritage of *e pluribus unum*." http://goldmine.cde.ca.gov/standards/history/intro.html (last visited Dec. 10, 2003). Beginning in Grade One, California's public school students learn about citizenship and how "the symbols, icons, and traditions of the United States . . . provide continuity and a sense of community across time." http://goldmine.cde.ca.gov/standards/history/grade1.html (last visited Dec. 10, 2003). These students recite the Pledge, sing patriotic songs, and learn to identify historical documents such as the Declaration of Independence. *Id.* Each grade increases the students knowledge of American history in an effort to "foster students' understanding of historical events by revealing the ideas, values, fears, and dreams of the people associated with them." http://goldmine.cde.ca.gov/standards/history/intro.html (last visited Dec. 10, 2003). The standards recognize the role religion played in the founding of America and its lasting moral, social, and political impacts. The Ninth Circuit opinion would lead to the curious conclusion that the state's standards for the study of American history would need to be

revised to eliminate the recitation of the Pledge or any historical document recited by students that makes any reference to a supreme being. Such an intrusion into a core state function is untenable.

The Pledge is an act of patriotism. It is not an act of religious faith to Pledge one's allegiance to the United States and to the flag that represents this nation. This Court has indicated repeatedly that the Pledge's text, as amended, does not violate the Establishment Clause.[9] For example, in *Lynch v. Donnelly*, 465 U.S. at 693, this Court stated unequivocally that the Pledge does not violate the Establishment Clause because the phrase "One nation under God" is a constitutionally acceptable expression of our heritage which "solemniz[es] public occasions, express[es] confidence in the future, and encourag[es] the recognition of what is worthy of appreciation in society." This Court reasoned that the language "One nation under God" as part of the Pledge is another example of our religious heritage. *Id.* at 676.

In addition, this Court has addressed the broader issue of the permissibility of historical references to our nation's founding. In *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962), this Court cited with approval the fact that "school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity." One year later, this Court in *School District of Abington Township v. Schempp*, 374 U.S. 203, 213 (1963), explained our national life

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[9] *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989) (unlike the Pledge, the display of the creche by itself was unconstitutional).

reflects a religious people in noting numerous permissible public references to God in historical documents and ceremonial practices, such as oaths ending with "So help me God" and "in God We trust."

This Court's opinions throughout the decades recognize that the Founders believed our rights as free and equal people flowed from a higher source than the whim of a monarchy or from the sufferance of a current political majority. *See Lynch*, 465 U.S. at 675. Accordingly, this Court acknowledged that the Founders did not intend to prohibit government expressions that recognize this country's religious heritage. *Id.* Rather, our history is replete with the Founders' official references to a supreme being. *Id.*

In short, the Pledge is not an exercise of religious faith but merely recognizes that this nation was founded on the basis of a number of principles, including an acknowledgment of the fundamental importance of faith. The Pledge is designed for all Americans, regardless of religious faith. It is simply a recognition of what it means to be an American.

CONCLUSION

In order to reaffirm the ability of our public schools to refer accurately to our nation's history, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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